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No _____

IN THE UNITED STATES SUPREME COURT

. OCTOBER TERM 1982

UNITED STATES OF AMERICA

PLAINTIFF/RESPONDENT

VS.

ROBERT EARL MILLER

DEFENDANT/PETITIONER

On Petition for Writ of Certiorari to the United States
Court of Appeals, Sixth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

CAN THE COURT OF APPEALS ENTER AN ORDER AFFIRMING A CONVICTION IN A CRIMINAL CASE WHEN PETITIONER WAS NOT GIVEN THE OPPORTUNITY TO CHALLENGE THAT CONVICTION ON APPEAL, THUS RESULTING IN A DENIAL OF THE RIGHT OF APPEAL?

II.

IS PETITIONER'S CONVICTION OF CONSPIRACY TO TRANSPORT UNLAWFUL EXPLOSIVES IN VIOLATION OF 18 U.S.C. SEC. 371, 842 (a)(3)(A) BARRED BY COLLATERAL ESTOPPEL INsofar AS PETITIONER WAS ACQUITTED OF CONSPIRACY TO MANUFACTURE AND TO STORE?

III.

IS THERE SUFFICIENT EVIDENCE TO CONVICT PETITIONER OF CONSPIRACY TO TRANSPORT UNLAWFUL FIREWORKS WHEN THE ONLY EVIDENCE AT TRIAL EQUALLY SUPPORTED THE INFERENCE THAT PETITIONER TRANSPORTED LEGAL FIREWORK?

IV.

DOES THE DOCTRINE OF LENITY APPLY TO PETITIONER TO BAR HIS CONVICTION UNDER SEC. 371, 842 INsofar AS THERE IS A LESSER PUNISHMENT STATUTE WHICH WOULD EQUALLY APPLY?

V.

IS THE INDICTMENT UNDER WHICH PETITIONER WAS CHARGED FATALLY DEFECTIVE BECAUSE IT FAILS TO ALLEGE ANY OVERT ACT IN FURTHERANCE OF A CONSPIRACY TO TRANSPORT?

VI.

IS THE INDICTMENT UNDER WHICH PETITIONER WAS CHARGED FATALLY DEFECTIVE AS IT CHARGES PETITIONER, IN ONE COUNT, WITH THREE SEPERATE OFFENSES IN THE DISJUNCTIVE?

VII.

IS PETITIONER'S CONVICTION BARRED BECAUSE PETITIONER WAS THE ONLY DEFENDANT CONVICTED OF CONSPIRACY TO TRANSPORT UNLAWFUL FIREWORKS?

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IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

PLAINTIFF/APPELLEE,

VS.

ROBERT EARL MILLER (NO. 81-5861),

DEFENDANT/PETITIONER.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

Comes now the Petitioner, ROBERT EARL MILLER, by counsel, and respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals, Sixth Circuit, in the case styled United States of America v. Robert Earl Miller, et al, No. 81-5861. As grounds for his writ of certiorari, he alleges and states:

OPINION BELOW

The opinion and decision of the United States Court of Appeals, Sixth Circuit, in the case styled United States of America v. Robert Earl Miller, No. 81-5861, the case for which the writ of certiorari is sought, was filed on December 3, 1982. The opinion and decision is contained in the appendix filed by counsel for Petitioner.

JURISDICTIONAL STATEMENT

In United States of America v. Miller, the United States Court of Appeals entered an order and opinion reversing Petitioner's conviction for conspiracy to manufacture illegal fireworks in violation of 18 U.S.C. Sec. 371, 842 (a)(1) and remanded the case for the entry of a judgement of conviction under U.S.C. Sec. 371, 842 (a)(3)(A) (conspiring to transport) and for sentencing thereunder. Petitioner timely filed his motion for rehearing in the United States Court of Appeals, which was overruled by the Court on January 24th, 1983. This petition is being filed within sixty days of the rendering of the final judgement in the case as required by Supreme Court Rule 20. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: the constitutional doctrine giving this Court the supervisory power over questions of Federal Law ruled upon by the inferior Federal Courts, ART III SEC. 1; and due process of law, Amend. V, U.S. Const.

STATUTES INVOLVED

Sections 371, 842 United States Code, Title 18

STATEMENT OF THE CASE

Petitioner was indicted in one count of violation of 18 USC SEC. 371, 842. Three separate charges were submitted to the jury: conspiracy to manufacture; conspiracy to transport; and conspiracy to store (unlawful fireworks without a license). The jury acquitted Petitioner Miller of conspiracy to store, and found him guilty of conspiracy to manufacture and conspiracy to transport (unlawful fireworks without a license). The trial court convicted and sentenced Petitioner Miller only of conspiracy to manufacture. The United States Court of Appeals for the Sixth Circuit in case No. 81-5861 (December 3, 1982) set aside Miller's conviction for conspiracy to manufacture upon a failure of proof and discharged Petitioner, but remanded the case for resentencing under conspiracy to transport in violation of 18 USC SEC. 371, 842 (a)(3)(A).

REASONS FOR GRANTING THE WRIT

Upon a jury verdict of guilt of conspiracy to manufacture and conspiracy to transport unlawful fireforks (submitted to the jury in two separate verdict directors). Petitioner appeared for sentencing before the United States District Court for the Eastern District of Kentucky (Bertelsman, J.). The trial Court entered an order

convicting Petitioner of conspiracy to manufacture unlawful explosives and sentenced Petitioner to five years in prison and a fine of \$10,000. There was no conviction upon the verdict of conspiracy to transport. Thereafter, Petitioner filed his appeal to the United States Court of Appeals for the Sixth Circuit challenging his conviction of conspiracy to manufacture unlawful explosives. Petitioner raised no arguments concerning the sufficiency of the evidence to transport, the sufficiency of the indictment, or any evidentiary matters bearing solely on the conspiracy to transport verdict as there was no judgment from which to appeal. Petitioner's arguments before the Sixth Circuit exclusively pertained to his conviction for conspiracy to manufacture. On December 3, 1982, the Court of Appeals handed down an opinion reversing Petitioner's conviction for conspiracy to manufacture as there was insufficient evidence to sustain the conviction. The Court, however, remanded the case for entry of judgment and sentencing upon the verdict for conspiracy to transport unlawful explosive. Petitioner filed with the Court of Appeals a motion for rehearing insofar as he was never able to appeal the jury verdict of conspiracy to transport. The motion was overruled.

Petitioner submits that the action of the Court of Appeals in sanctioning a conviction that was not entered in the Trial Court denies his right to appeal guaranteed him in F.R.App. Pro. Rule 3 and under the laws and statutes of the United States. Because Petitioner was precluded from challenging the verdict of the jury, as it was not a final judgement, he should not now be allowed to suffer a conviction for that offense or to suffer any fine or imprisonment thereunder.

II.

Petitioner submits that his conviction of conspiracy to transport should be barred by collateral estoppel as he has already been acquitted of conspiracy to manufacture and conspiracy to store. The facts supporting this allegation are more fully set forth in Petitioner's argument concerning the sufficiency of the evidence. The government alleged, and it was their theory at trial, that Petitioner and others were involved in a conspiracy to manufacture, store and transport unlawful explosives. There was no evidence, either direct or circumstantial, that Petitioner ever had any conversations, planning sessions or schemes with the codefendants involving the manufacture, storage, or interstate transportation of "unlawful" fireworks. The government's entire case

rested on the evidence that Petitioner sent the codefendants money and later came to Kentucky to receive boxes (the contents of which were unknown.) Petitioner is a seller of legal fireworks in DeKalb, Missouri. It was the government's theory that since the money sent by Petitioner to the codefendants was sent before the manufacturing of the illegal fireworks occurred, that Petitioner was conspiring to manufacture and store these illegal fireworks. The jury rejected this inference in acquitting Petitioner of conspiracy to store the fireworks and the Court of Appeals acquitted Petitioner of conspiracy to manufacture the same. Thus, there has been a finding that Petitioner did not conspire to have produced, for him, a quantity of unlawful fireworks. Likewise, then, there is no evidence that Petitioner conspired to purchase or receive these alleged unlawful fireworks. As the inference advanced by the government at trial has been rejected, the inference cannot now be resurrected to support a conviction for conspiracy to transport. Ashe v. Swenson, 397 U.S. 436 (1970).

III.

Certiorari is required insofar as Petitioner Miller contends there was insufficient evidence of a conspiracy to "transport" in violation of 18 USC Sec. 371, 842 (a)(3)

(A). A conspiracy to "transport" requires that Petitioner Miller plan a scheme with others to receive, transport, and store or sell illegal fireworks in an illegal manner. Each element of a conspiracy must be proved beyond a reasonable doubt. U.S. v Salinas-Salinas, CA5, 1977, 444 F2d 470. It is respectfully submitted that the Court of Appeals in its order of affirmance overlooked the fact that there was no evidence adduced at trial which could be interpreted as proving beyond a reasonable doubt that an agreement existed between, or among, the conspirators and Petitioner to transport explosive materials without a license across state lines. Inferences cannot be piled one upon the other to so conclude. U.S. v Ingram, 360 U.S. 672, 678; 3L.Ed.2d 1503, 1508; 79 S. Ct. 1314. The jury acquitted Petitioner Miller of conspiracy to "store" and this Court acquitted Petitioner Miller of conspiracy to "manufacture." Since there was no evidence of Miller's guilt for the substantive offense, there must be some proof, either direct or circumstantial, of a plan to knowingly transport unlawful fireworks. The government's "proof" of this scheme is the same as the government's insufficient proof of a plan to manufacture (i.e., that Miller purchased fireworks and picked up fireworks-without evidence that the fireworks Miller received were illegal). If the government could have proved that Petitioner Miller received unlawful fireworks, they could have convicted him of the substantive offense; they did not have such proof. In fact, there was no evidence which led to any inference that Petitioner Miller was anything more than an innocent purchaser of lawful fireworks. Since there is

no permissible inference of a conspiracy to "manufacture" or to "store," and since there is no inference of transporting unlawful fireworks, there can be no logical, legal or permissible inference of a conspiracy to "transport" unlawful fireworks.

In support of the foregoing, the following facts are presented:

First, there was no evidence that Miller ever possessed unlawful fireworks. In fact, Agent Rapier testified (Tr. 620, App. 296):

Q. Have you ever found any M-80's, illegal M-80's on Mr. Miller's property?

A. No, sir, I have not.

Q. Have you ever found any illegal M-100's on (tr. 621, App. 297) his property?

A. No, sir, I have not.

Q. Have you ever found any illegal firecrackers at all on Mr. Miller's property or in any of his automobiles or anything else?

A. No, sir, I have not.

There was no proof of any kind during the trial that anything was ever found on either Fenton or Petitioner Miller's property, and no proof that either Fenton or Petitioner Miller ever sold or planned to sell anything illegal.

The trial court even expressed doubt about the sufficiency of the government's "transporting" case (Tr.358):

I'm going to allow it (Government witness Fenton's statement) to be admitted.

I'm specifically reserving, however, on whether that's enough to constitute an offense on this indictment.

I'm going to consider very seriously the motion that will come at the end of the case if that's all you have got....."

The linchpin of the government's case was the inference that Miller transported unlawful M-80's and M-100's. There was no proof of this.

Most of the government's evidence in this case came from people who were directly involved in the manufacture of illegal M-80 and M-100 firecrackers. Ellen Orta, David Herald and his wife, who were undoubtedly the government's star witnesses, struck a deal with the government and in return for their testimony, various counts were dismissed and they were permitted to enter a plea of guilty to one count each.

Mr. Herald worked in almost every phase of the operation, including the manufacturing of 600 trays for M-80 and M-100 fireworks in January and February, 1981. At one point in this operation, he even kept the equipment for the manufacturing in his own garage. He delivered and unloaded the tubes to the garage on John Street where the powdering took place, and sometimes the glueing of the second end, except some of it also took place in his own garage at home. After the glueing was finished and dried, (three to four days), the tubes were wicked in Herald's garage.

Ellen Orta testified that no operation took place between Christmas, 1980, and March, 1981.

Mr. Herald testified that after the operation started back up, the powdering took place at John Street. This residence was rented on March 12, 1981. One day after Herald moved supplies in, as he testified, the powdering started (March 13, 1981). He testified that the fireworks required one day to powder (March 14), then they had to start glueing the second end and they had to dry three to four days again, (March 17 or 18). The fireworks would

then be wicked, which was the slowest process and took some time, then they were bagged and boxed. This would make the finished product coming out of production no earlier than March 19. No matter how many trays they had, by Mr. Herald's testimony, none was produced before this date, because Mr. Herald testified the equipment was stored in his garage, and no illegal powdering was done anywhere other than at the John Street location in March of 1981.

According to the evidence adduced at trial, (Herald's testimony), he did not know when Petitioner Miller was there. He stated that it could have been sometime in the middle of March, or around March 14. Thus, it would have been impossible for Petitioner to have received illegal fireworks.

Another difficulty with the government's proof concerns what Miller received. There was obviously no proof that Miller received illegal fireworks. If there had been such proof, the government could have prosecuted him for that. Then, what did Miller receive? If he received legal fireworks, he could not be guilty under 842 (a) (3) (A). There must be proof, sufficient to exclude the reasonable hypothesis of innocence—that Miller planned to purchase legal fireworks—that he indeed conspired to transport illegal fireworks.

The question might arise: what are toy M-80's? What are toy M-100's? What is the difference between them and the ones charged in the indictment which were supposedly manufactured by Victor Scharstein?

They were, as described, look-alikes. They were regular Class C Common fireworks inside a larger tube simulating their illegal cousins, or like the ones

people used to buy legally before the Consumer Products Safety Commission banned them as a hazardous substance under 16 CFR Sec. 1500.17(a)(3):

Fireworks devices intended to produce audible effects (including but not limited to cherry bombs, M-80 salutes, silver salutes, and other large firecrackers, aerial bombs, and other fireworks designed to produce audible effects, and including kits and components intended to produce such fireworks) if the audible effect is produced by a charge of more than 2 grains of pyrotechnic composition...(Petitioner Miller's Brief pp. 29 and 30.)

Nowhere was there any testimony that any of the toy M-80's or toy M-100's that either Petitioner Miller sold or witness Al Fenton sold contained more than 2 grains of pyrotechnic composition. Fenton's testimony is instructive (Tr. 593, App. 278):

Q. Were those legal Class C firecrackers that you bought? From Mr. Miller, on those dates?

A. He told me they were. They had a firecracker in 'em.

Q. What did they look like? (Tr.594, App.279)

A. Just a round, red tube with actually a firecracker around and a fuse coming out of it.

Q. Did you see the firecracker?

A. Yes, you could see the firecracker in one end.

Q. And when you say firecracker, what are you talking about?

A. Lady finger, or, you know, something to that variety.

Q. And what did you pay for these M-80's-is that what they are called, are they called M-80's?

A. Yes.

Q. Is there any other descriptive name you can use with it?

A. Well, they's M-80's, M-70's, M-50's, M-100's and pyros--

Q. Are all these Class C common fireworks that can be sold in the State of Missouri?

A. Yes.

Q. Did you think you were buying Class C fireworks when you bought these?

A. Yes.

Q. Have you had any information given to you that they were not Class C fireworks? (Tr. 595, App280)

A. No, the only-no.

Q. To your knowledge in the year 1981, have you ever purchased from Mr. Miller illegal M-80 or M-100 fireworks?

A. No.

Q. Now, you said in your testimony, I believe on direct that you also bought some M-100 fireworks from Mr. Miller, is that correct?

A. Yes

Q. What do they look like?

A. They're grey, 'bout maybe two, two and a half inches long with a sealed--plastic sealed tube. Plastic in each end of the tube with a wick coming out and they are bigger.

Q. What's inside those?

A. Three, I think three of the smaller firecrackers.

Q. Lady fingers?

A. Yes. Well, the lady fingers are the bigger ones--the next size.

Q. Black cat?

A. Yes, right.

Q. Now, are those legal in the State of Missouri to sell to your knowledge?

A. Yes.

Q. Now are these the ones that you sell out of your car?

A. Yes.

Q. Do you think you can get a better price for them out there?

A. It makes them sell mighty good.

These toy M-80's are further described on Petitioner Miller's price list, Exhibit 5 (tr. 733, Addendum to Joint Appendix 16-22). They are set out on page one of the price list (Add. Jt. App.19) on the lower right hand corner of the page.

The question might arise: why were these toys not introduced into evidence? Petitioner Miller did bring samples of all of the above toys to be entered into evidence, and they were stored during the trial in the U.S. Marshall' office. Also, Petitioner Miller did bring to the trial other price lists from other fireworks dealers with similar lists of toy M-80 fireworks. Why were they not used? Because of Judge Bertleman's orders enjoining Petitioner's counsel from doing so; Petitioner's counsel stated to Petitioner that to do so would be disobeying the Court's order.

(tr.555, App 255)

The Court: I don't see what it's got to do with that or anything that has been raised in this case so far. Whether some person set up a facility and went and got a license he could manufacture M-80's.

(Tr.556, App.253)

Mr. Kranitz: I'm not sure it does, either, but that is what I was trying to tell you at the bench conference that based upon what he testified to I didn't know how to conduct any cross-examination. Maybe I just should have sat down and...

The Court: Well, maybe you should have, now you have opened the door to a can of worms-mixed metaphor-but, in any event, you have uncapped a can of worms and I am going to stop it right here.

That's relevant to the case. Does the jury believe that the United States has established beyond a reasonable doubt that they were making some kind of fireworks in there without a license, storing it and transporting it in interstate commerce, any or all of it or part of it or some kind of combination of it.

That's the issue.

Whether the United States can convince the jury of that. Whether somebody could be licensed-some hypothetical person under the proper conditions could be (tr. 447, App. 254) licensed to manufacture M-80's, I don't see where it's got anything to do with it.

And I am going to exclude any further evidence on that..

Counsel for Petitioner Miller obviously took this to be an order from the Court that defense could not introduce any evidence of toy M-80's or toy M-100's because according to the Court, toys, or make believes, were not on trial here. Now the question arises: why did the Court rule not to allow any further evidence on legitimate Class C Common fireworks when the Court had made a previous statement to Petitioner's counsel?

(Tr.317) The Court: Well, you won't need to say it. The jury will say where is all this stuff from his opening statement that he was talking about.

Mr. Kranitz: Yes, the jury is going to say, where is he promised all these sparklers and everything, where'd they-where are they?

The Court erred in permitting the Assistant U.S Attorney to argue whether the toy M-80's and toy M-100's were or are "fake" or "phonies" as he calls them, because it was highly prejudicial and because said argument is improper.

Thus, the trial court erred in allowing the Assistant U.S Attorney to make such highly prejudicial remarks about Petitioner Miller's Class C Common fireworks. The Court, on one hand, makes a statement that if we do not produce our proof the inference is that the jury will convict Petitioner Miller, and then in another statement, excludes any further evidence on that.

The government has stated that Mr. Miller's business records were only self-supporting, and that he did not produce any other witnesses other than himself to support the other names that appeared on his invoices, and Mr.

Rawlins has stated these records are untrue because no one else was there to testify to them, but this is only his theory and he has no proof, nor did anyone testify absolutely that they were untrue.

Mr. Corless (Tr. 140, App. 75), a contract agent for Western Union in St. Joseph, Missouri, testified that he did not take the money for the wire transfer, nor did he even know who sent the telegram, other than the telegram simply stating Mrs. R. Miller (Tr. 147). Someone else in his office took the money, made the records and sent the telegram in his office.

Miss Thomas of the Western Union office in Cincinnati was the city manager (Tr. 188) and never once stated she made or had anything to do with the making of the records she testified to. In fact, Mr. Rawlins asked her:

Do you have knowledge about the manner in which telegraphic money orders are handled? (Tr. 189)
Are you familiar with the entries on these and what they mean in Western Union's business practices?
And what did you do or what was the office practice when that arrived there, what did the company do?
(Tr. 190)

Mr. Rawlins stayed away from asking her if she actually made any of these records, or if she was even present when they were made.

Mrs. Lockwood (Tr. 176), credit manager for Herbert Verkamp Calvert Chemical Co. in Cincinnati presented cash sales receipts made out to B & B Novelty Co., owned by Victor Scharstein (Tr. 178), and she testified:

Any cash sale is sent to the dispatcher's office and at that time a cash sale is written up and the transaction is paid for. When it is paid for, the customer

is given a yellow copy to take to the plant and he is given the material, it is loaded on his truck. The original and the payment for that is brought to me (Tr. 179).

These were all ordinary business records, and if you were to ask any of them why they kept records, the answer would have to be for themselves, for tax records, etc., but of the three witnesses it was never testified that any of those people had anything to do with those records, except that they were under their care. But Mr. Miller made out his own records, kept them, and testified to this, and there was no proof that they were falsified.

There is no proof, either circumstantial or direct, of any knowledge. It cannot permissibly be inferred. "The substantive offense obviously cannot be committed in the absence of knowledge or wilfulness."

In reviewing the evidence of the government's case against Petitioner Miller, one can find nowhere the proof of any facts from which reasonable minds could conclude beyond a reasonable doubt constituted knowledge and guilt of the alleged conspiracy. Therefore, there was insufficient evidence to sustain a conviction.

IV.

During the course of the government's prosecution of Petitioner, the United States attempted to prove that he conspired to manufacture, deal, transport and store explosive materials. The United States also attempted to prove that he actually engaged in the business of manufacturing and dealing in explosive materials. Throughout this case,

both at the pre-trial stage and during the evidence at trial, the United States through its witnesses continually referred to the explosive material as M-80 and M-100 firecrackers containing a perchlorate mixture, commonly known as flash powder. (T.r., P. 69, P. 355, P. 520). In order to determine whether or not a prosecution such as this can be successful, it is necessary to determine whether M-80 or M-100 firecrackers are prohibited under Title 18 USC Sec. 841 et. seq.. An analysis of the statutes in question, the Federal regulations enacted thereunder, and the legislative history make it clear that the manufacture, distribution, transportation and storage of such fireworks have been excluded from the prohibition set out under 18 USC Sec. 841.

Title 18 USC Sec. 841 et. seq., and the regulations promulgated thereunder do not deal with either M-80 or M-100 firecrackers and do not prohibit or ban those items. Section 841 (d) mandates that the Secretary of the Treasury shall annually publish in the Federal Registry a list of all explosives banned under the act, (Emphasis supplied). Webster's Third New International Dictionary defines "ban" as meaning "to prohibit especially by legal means..." A copy of the Treasury Secretary's list of explosive materials, as published in Volume 45 #155 of the Federal Registry, Page 52976 (Friday, August 8, 1980), was introduced as Exhibit 55 for the Government. Nowhere does it ban either M-80 or M-100 fireworks as explosive materials. The Trial Court ruled at trial, however, that those items were explosive materials within the meaning of the act.

In its opinion of January 22, 1983, the Trial Court seems to base its ruling on the proposition that these

materials are banned because they"... were a device or chemical compound mixture which had the common purpose to function by explosion." Further, the Trial Court found that the powder contained in the devices was an explosive powder known as a "perchlorate explosive mixture." This reasoning is clearly erroneous based upon the testimony at trial. Agent Dale Beam stated that perchlorate explosive materials were components of fireworks other than M-80 and M-100 firecrackers. (Tr., P. 123-124). George Peterson, an ATF chemist, testified that the perchlorate mixture known as flash powder was an ingredient of common fireworks. (t.r., P. 370-371). Roy Parker, the government's own expert, stated that perchlorate mixtures were used throughout the fireworks industry (T.r., P.520) and that it was the Consumer Products Safety Commission that regulated the amounts of perchlorate mixtures that could be contained in various types of firecrackers. (T.r., P. 536). Finally, Mr. Parker stated that the components of flash powder were readily available on the open market (T.r., P.538). Thus, it can be seen that the perchlorate mixtures, which are regulated by various departments of the government, are not banned. Rather, Title 15 USC Sec. 1261 et.seq. known as the Federal Hazardous Substance Act, prohibits the introduction into interstate commerce of such hazardous substances.

The Secretary of Health and Welfare is mandated to publish in the Code of Federal Regulations a list of hazardous substances; 16 CFR Sec. 1500 et.seq., specifically lists as banned goods or substances, M-80 and M-100 firecrackers as follows:

Fireworks devices intended to produce audible effects including but not limited to cherry bombs, M-80s, salutes, silver salutes, and other large fireworks designed to produce audible effects and including kits and components intended to produce such fireworks if the audible effect is produced by a charge of more than two grains of pyrotechnic composition. 16CFR Sec. 1500.17 (a) (3).

Further, the Court's attention is directed to the case of United States v. Chalaire, 316 F. Supp. 543(E.D. La. 1970), wherein the U.S. District Court for the Eastern District of Louisiana concluded that "...cherry bombs and silver kings were banned by the Federal Hazardous Substance Act from being introduced into the channels of interstate commerce." Although Chalaire does not specifically deal with M-80's and M-100's, silver kings and cherry bombs are Class B fireworks which contain flash powder (perchlorate explosive mixtures), the very same type of explosive which the government produced at this trial. Further, in the Chalaire opinion, the Court stated at page 547:

Silver Kings and cherry bombs are toys within the meaning of the Federal Hazardous Substance Act. The Act itself expressly excludes Class C (common) fireworks, but not Class B fireworks. Also, the legislative history of the act clearly states that Congress intended to include silver kings and cherry bombs (Class B fireworks) within the definition of toy.

Finally, this prosecution was based on the premise that the activities of the Petitioner were carried on without a license. Nevertheless, throughout the trial, the United States contended that those same activities could never have been licensed. (T.r., P.512, P.539).

If in fact the complained of activities were not subject to the licensing requirements, then the rhetorical question is asked: How could the activities for which this indictment was brought be within the purview of that statute? Thus, the indictment was not properly brought under the correct statute.

Because 18 USC Sec 841-848 are silent as to the type of fireworks that are the subject matter in this case; because the Federal Regulations as set out in Government's Exhibit 55 do not list such firecrackers on the list of banned explosive materials; and because perchlorate mixtures are not banned but are, in fact, regulated by other governmental departments, those sections in no way prohibit the manufacture, assembly, or storage of M-80 or M-100 fireworks. If prohibited, such conduct is prohibited under the Federal Hazardous Substance Act as set out in Title 15 of the United States Code and this prosecution should have been brought thereunder.

Because both 18 US Sec. 841 et. seq. and 15 USC Sec. 1261 et. seq., regulate the same conduct, the Court should have applied the doctrine of lenity in the disposition of the Motion for directed verdict of acquittal. To do so the Court should have considered not only the wording of the related statutes but the congressional intent in enacting the statutes.

The doctrine of lenity is an ancient principle of common law recognized throughout time by the United States Supreme Court. It is a rule of statutory construction stating that ambiguity concerning the ambit of criminal statutes is to be resolved in favor of lenity; that is, where the intention of Congress is not clear from the act

itself and reasonable minds might differ as to its intention, the Court will adopt the less harsh meaning. The Court's attention is drawn to the annotation entitled Supreme Court's Views as to the Rule of Lenity in the Construction of Criminal Statutes, 62 L.Ed. 2d 827 (1979).

The rule of lenity does not apply unless there is a genuine ambiguity in a criminal statute that cannot be resolved by consideration of the statutory language and legislative history. An ambiguity is said to arise "where the legislature has enacted two or more provisions or statutes which appear to be inconsistent," (Emphasis mine) 73 Am. Jur. 2d Sec. 195. Although it is Petitioner's primary contention that it is clear that 18 USC Sec. 841 et. seq., do not prohibit the conduct charged, at the very least the existence of 18 USC Sec. 841 et. seq., together with 15 USC Sec. 1261 et. seq., creates an ambiguity which cannot be resolved by a mere reading of the statutes and pertinent legislative history.

This ambiguity arises by the failure of 18 USC Sec. 841 et. seq., and the promulgated regulations thereunder, to specifically delineate M-80 and M-100 firecrackers as covered thereunder. There is no question, however, as to whether 15 USC Sec. 1261 et. seq., and the subsequent regulations, prohibit the distribution and transportation of those same fireworks. The prohibition is specifically set forth in 16CFR 1500.17 (a)(3), as argued in the preceding section of this brief.

"Ambiguous" is defined in Webster's Unabridged Dictionary, 2d Edition, as:

Having two or more possible meanings; being of uncertain signification; susceptible of different interpretations; hence, obscure; not clear; not definite; uncertain or vague.

Whenever two statutes overlap, and the government contends that one proscribes inferentially the same conduct that the other specifically prohibits, ambiguity must arise. Thus, within the doctrine of lenity is the concept that where overlapping statutes prohibit the same conduct and proscribe different punishment, and one is less harsh than the other, the conflict must be resolved by applying that statute which imposes the least harsh punishment. Prince v. United States, 352 U.S. 322, 370 (1957). Further, in Rewis v. United States, 401 U.S. 808 (1971) at 812 the Supreme Court states:

Ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity.

See also: Bell v. United States, 349 U.S. 81 (1955). In United States v. Culbert, 435 U.S. 371 (1978) at 379, the Court once again stated:

It is true that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

Although the Court in Culbert failed to apply the doctrine of lenity it did so on the basis that the two statutes were not ambiguous as to one another. That is not the situation in the present case, as both Title 18 and Title 15 attempt to regulate flash powder mixtures.

The government has elected to indict this Petitioner under the provisions of 18 USC Sec 841 et. seq.. A close reading of that statute, however, reveals that it fails to deal at all with the manufacture, storage, or distribution of M-80 or M-100 fireworks. We have already seen that if 15 USC Sec. 1261, together with 16 CFR 1500.17, sanctions the introduction of fireworks devices including M-80 and M-100 fireworks at all, which the Petitioner states is not the case, it does so only by inference. However, 15 USC Sec. 1261 specifically mentions the prohibitions against M-80 and M-100 fireworks.

The Trial Court acknowledged that ambiguities in criminal statutes must be resolved in favor of lenity. It went on to find that for the doctrine to apply the ambiguity must exist in the type of conduct prohibited or in the length of sentence to be imposed. Finding that no ambiguity existed in the case before the Court, the Trial Court and the United States relied upon United States v. Batchelder, 422 U.S. 114 (1979). Petitioner contends that this emphasis was misplaced and that the Batchelder decision can be distinguished from the within cause. Batchelder states that the Court will find no ambiguity where Congress has clearly stated its intent. Congress stated no intent to regulate the manufacture of M-80 or M-100 firecrackers in the passage of 18 USC Sec 841-848.

A reading of the legislative history of both acts shows that firecrackers were never considered when 18 US Sec 841 was before the appropriate congressional bodies. M-80's and M-100's had already been banned, except for certain use, under 15 USC Sec. 1261 and had been so banned for at least four years prior to the passage of the act. However, the history of 15 US Sec.

1261 "clearly shows that Congress intended to include (Class B fireworks)," United States v. Chalaire, 316 F. Supp. 543, 547 (E.D. La. 1970). Not one recorded word can be found that ever mentioned the items herein under consideration in the legislative history of Title XI of Public Law 91-452. Furthermore, the appellate decisions which have been rendered under 18 U.S. Sec. 841 et. seq., deal only with the intentional bombings of facilities affecting interstate commerce. The explosives involved with the reported cases are such items as pipe bombs, dynamite, and "Molotov" cocktails. Fireworks prosecutions can nowhere be found undertaken under Title 18 USC Sec. 841, but are rather found under Title 15.

In U.S. v Porter, 591 F. 2d 1048 (5th Cir. 1979), it was held:

Since this is the first prosecution under this statute, we must construe the statute strictly against the prosecution and in favor of the accused. If there is a fair doubt as to whether a Defendant's conduct is embraced in this prohibition, the policy of lenity requires that the doubt be resolved in favor of the accused.

Here the government, through creativity and a special prosecutorial enthusiasm, attempts to bootstrap otherwise minor criminal conduct into a major felony. This cannot be done, even considering the "tragic" explosion that occurred at the fireworks factory. The explosion is simply not relevant or material to any charge that was, or might have been brought against Petitioner.

Where the matter is not free from doubt, the issues

must be resolved in favor of lenity. Whalen v. United States, 445 U.S. 684(1980). A citizen must be properly put on notice of what the law requires of him if he is to be held accountable for disobedience of those requirements. If that law is so ambiguous that it does not properly inform the citizen of what is expected of him in the form of lawful behavior, he must constitutionally be protected from overzealousness of the prosecutor. We can only afford this Petitioner his constitutional protection by interpreting these statutes in accordance with the evident intent of the Congress in enacting them. Nowhere in the legislative history of the statutes in question can the Court conclude that Congress intended to make sentencing under Title 18 US Sec. 841 an alternative to sentencing under 15 USC Sec. 1261, an act which the government is attempting to do in this case.

By applying the doctrine of lenity and by looking at the legislative intent behind both 18 USC Sec. 841 and 15 US Sec. 1261, the ambiguity present in these overlapping statutes must be resolved in favor of the Petitioner. Thus, no prosecution can be had against the Petitioner under the provision of 18 USC Sec. 841 et.seq.. To allow such a prosecution is to permit the United States Attorney to put himself in place of the Congress and the Court, proceed with his own interpretation of the clearly conflicting statutes, and enhance the alleged offense from what Congress clearly intended to be a misdemeanor into a felony.

V.

Petitioner also complains that the failure to allege an overt act is grounds for dismissal of the Indictment. As a result thereof, the Courts have held that an indictment simply charging a conspiracy following the statutory language is insufficient. It must also contain an adequate statement of an overt act to effectuate the object of the conspiracy. U.S. v Storkel (1970) 430 F. 2d 262; U.S. v Root, 366 F 2d 377.

The object of the conspiracy charged in this indictment is obviously to effect the interstate transportation of explosive materials. Yet the Government failed to allege in the indictment any relevant overt acts in reference to the same. In the overt acts portion of the indictment, the Government set forth no less than fifteen alleged overt acts. Petitioner Miller, however, was an alleged participant in only two of those. They are set forth as follows:

8) On or about March 8, 1981, Victor Forrest Scharstein, contacted REM in DeKalb, Missouri and as a result of said contract, on or about March 9, 1981, caused to be wired to VFS the sum of \$1750.00, via Western Union, to finance the further manufacture of a quantity of illegal explosives. (Emphasis added).

9) On or about a date in March 1981, subsequent to March 9, 1981, Robert Earl Miller traveled to Silver Grove, Kentucky in the Eastern District of Kentucky and received from Victor Forrest Scharstein 125 cases, more or less, of illegally manufactured M-80 firecrackers. "(Emphasis added.)

No other overt acts against Miller are alleged.

Taking each allegation of overt act separately, it can be seen:

1. That the first act alleged deals specifically with the conspiracy to manufacture. This Court held in its prior order that the Government failed in its case therein.

2. That the second act alleged deals simply with the receiving of merchandise. Nowhere is it alleged that said merchandise was transported across state lines, nor that anyone entered into an agreement to do the same.

In fact, Assistant United States Attorney Rawlins stated at trial, at a bench conference, the following:

THE COURT:***Isn't he indicted for transporting these things in interstate commerce?

MR. RAWLINS: No. He's indicted for conspiracy. Conspiracy is-one of the charges is causing them to be transported in interstate commerce but he's not charged with transporting them. Because I can't prove that he left Kentucky with them directly.

The inference is obvious that he left Kentucky and went home at some point in time but I can't prove that, I've no witness who can prove that. Therefore, I've got a situation where I want to show that one, he knew they were illegal and two, these were not the kind of fireworks they are going to claim they are and three, that close in time he handled these same types of items out in Missouri.

I'm not charging it as a crime but as evidence of a plan, scheme, design, knowledge, these types of things.
(Tr. V II pp. 318-321).

As can clearly be seen from this exchange, not only did the Government fail to allege an overt act in reference to transportation, but it was never a part of the theory of its case. The entire theory was the conspiracy to manufacture. That was admitted by the United States at trial. Not one word of testimony was elicited in reference to an agreement to transport anything involving Petitioner Miller.

It has oft been stated that the essence of a conspiracy is an agreement, Iannelli v U.S., 956 S. Ct. 1284, 420 US 770, 43 L. Ed. 2d 616 (1975). No agreement was shown; no overt act was alleged or shown; and no evidence was presented in reference to a conspiracy to transport regarding Miller.

CONCLUSION

WHEREFORE, Petitioner Miller, for the reasons expressed herein, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit; and for such other and further relief as to this Court may seem meet and proper in the premises.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy or the foregoing Petition for Certiorari was this ____ day of _____, 1983, mailed to the office of the Hon. Robert E. Rawlins, Assistant United States Attorney, PO Box 1490, Lexington, Kentucky, 40591, and the United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio 45202, by depositing same in a regularly maintained U.S. Mail Depository.

Hugh D. Kranitz

NO. 81-5860
NO. 81-5861
NO. 82-5359

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 3 1962

UNITED STATES OF AMERICA

Plaintiff-Appellee

JOHN P. HEHMAN, Clerk

v.

WILLIAM LEDFORD WALTERS (81-5860)

ROBERT EARL MILLER (81-5861)

VICTOR FOREST SCHARSTEIN (82-5359)

ORDER

Defendants-Appellants

BEFORE: LIVELY, Circuit Judge; PHILLIPS and BROWN, Senior Circuit Judges.

The appellant in No. 81-5860, William Ledford Walters, was convicted at a jury trial of conspiracy to manufacture, deal, transport, and store explosive materials without a license and of manufacturing and dealing in explosive materials without a license in violation of 18 U.S.C. §§371 and 842(a)(1). The appellant in No. 82-5359, Victor Forest Scharstein, was also convicted by the jury of violating 18 U.S.C. §§371 and 842(a)(1) and in addition of transporting explosive materials without a license in violation of 18 U.S.C. §842(a)(3)(A). The defendant in No. 81-5861, Robert Earl Miller, was indicted in count one only of conspiracy to manufacture, deal, transport and store explosive materials without a license. The jury found Miller guilty of conspiring to engage in the business of manufacturing and dealing in explosive materials

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without a license and of conspiring to transport and ship such materials in interstate commerce, but ^{he} was found not guilty of conspiring to unlawfully store explosive materials. All defendants have appealed and have raised numerous issues in briefs and oral arguments.

The court has carefully considered the issues raised by each of the appellants and the responses of the Assistant United States Attorney. The court has also noted that the trial judge, Honorable William O. Bertelsman, considered many of these issues and filed orders in disposing of them. We agree with Judge Bertelsman that the conduct disclosed by the evidence is prohibited by 18 U.S.C. §842 and that the defendants were properly charged thereunder. We also agree with the ruling of the trial judge that the defendant Scharstein was not denied effective assistance of counsel at the trial. We conclude however, that the evidence was not sufficient to support a verdict beyond a reasonable doubt as to the defendant Miller with respect to the charge that he conspired to manufacture and deal in explosives without a license. The evidence was sufficient, however, to support the verdict that the defendant Miller conspired to transport and ship or cause to be transported and shipped explosive materials in interstate commerce.

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NO. 82-5359

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Upon consideration of the entire record on appeal together with the briefs and oral arguments of counsel the court concludes that the appellants Walters and Scharstein have identified no reversible error in the proceedings and that the defendant Miller has demonstrated error only in his conviction for engaging in the business of manufacturing or dealing in explosive materials.

The convictions of William Ledford Walters and Victor Forest Scharstein are hereby affirmed. The conviction of Robert Earl Miller for conspiring to transport and ship or causing to be transported and shipped explosive materials in interstate commerce is affirmed, and the conviction for engaging in the business of manufacturing or dealing in explosive materials is vacated. Since the judgment and commitment order identifies only the conviction for conspiring to manufacture and deal in explosive materials, the case is remanded to the district court for re-sentencing in the light of this court's conclusions.

ENTERED BY ORDER OF THE COURT

John A. Sullivan
Clerk